

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WPIX, Inc.)	Facility I.D. No. 73881
Licensee of Station WPIX(TV))	NAL/Acct. No. 0741420045
New York, New York)	FRN: 0002850147

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: July 11, 2007

Released: July 13, 2007

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),¹ by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,² we find that WPIX, Inc. (the “Licensee”), licensee of Station WPIX(TV), New York, New York (the “Station”), apparently willfully and repeatedly violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children’s programming.³ Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of fifteen thousand dollars (\$15,000).

II. BACKGROUND

2. In the Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children’s programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children’s programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a “program-length commercial”).⁴

3. On February 1, 2007, the Licensee filed its license renewal application (FCC Form 303-S) for Station WPIX(TV) (the “Application”) (File No. BRCT-20070201BPA). In response to Section

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ See 47 C.F.R. § 73.670.

⁴ *Children’s Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

IV, Question 5 of the Application, the Licensee stated that, during the previous license term, the Station failed to comply with the limits on commercial matter in children's programming specified in Section 73.670 of the Rules. In Exhibit 19, the Licensee indicated that between December 23, 2000, and December 23, 2006, the Station exceeded the children's television commercial limits on eight occasions. Specifically, the Licensee reported that the Station exceeded the children's television commercial limits by 30 seconds on two occasions. The Licensee maintained that one of these overages resulted from human error by a Station employee and the other overage was caused by human error on the part of an employee of GDMX, an entity that provides the WB Network with program format, content integration, and satellite uplink services.

4. The Licensee reported that on five occasions in September 2002, the Station aired a WB Network commercial for the Nintendo GameBoy E-Reader, during the "Pokemon" program. The Licensee claimed that one of these commercials aired as a result of a network buy by the WB Network and the remaining four instances were the result of local sales. The Licensee asserted that the Station did not know until after broadcast, when the WB Network brought the matter to its attention, that the commercial contained a "fleeting, obscured image" of a "Pokemon" game card. The Licensee stated that, the image, in which only the letters "MON" are visible for just over one second, did not depict any "Pokemon" character. According to the Licensee's description, the "Pokemon" card appeared as the third of six cards arranged in the shape of a fan during the display and "Pokemon" was not mentioned in the audio of the commercial. The Licensee maintained that the program-length commercial policy is inapplicable in this case because there is no likelihood that children would perceive any linkage between the "Pokemon" program and the GameBoy commercial. Further, the Licensee contended that the WB Network expressed its belief that the GameBoy commercial does not violate the Commission's rules or policies or the Children's Television Act's commercial time limits. Additionally, in support of its assertion that this incident does not violate the Commission's children's television commercial limits, the Licensee cited the Commission's conclusion in *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664 (2006) ("Omnibus Order"), that a broadcast of "The Amazing Race 6" did not violate indecency restrictions. Specifically, in the *Omnibus Order*, the Commission considered whether a momentary showing of the phrase "Fuck Cops!" written on the side of a train during an episode of "The Amazing Race 6" was indecent. The Commission found that the program was not indecent under the three principal factors that comprised the Commission's contextual analysis of this incident.

5. The eighth and remaining incident the Licensee reported occurred on December 23, 2006, when the Station aired a commercial containing a brief appearance of "Xiaolin Showdown" characters during the "Xiaolin Showdown" program. Based on the Licensee's description, a view of a "postopia.com" web site page was displayed, and the display included a banner across the top of the screen that depicted "Xiaolin" characters. Further, the Licensee stated that the banner was "no more than a tenth of the screen height." The Licensee indicated that the CW Network "mistakenly included" this commercial in the "Xiaolin Showdown" program.

III. DISCUSSION

6. Station WPIX(TV)'s record during the last license term of exceeding the Commission's commercial limits on seven occasions constitutes an apparent willful and repeated violation of Section 73.670. We note that five of the overages were program-length commercials.⁵ With respect to the Station's broadcast of the commercial for the Nintendo GameBoy E-Reader, although the Licensee contended that the "Pokemon" game card appeared for one second during the commercial, it is well-established that the determination as to whether a particular program is a program-length commercial is

⁵ From the Licensee's description of the "Xiaolin Showdown" commercial, it appears that this incident is more akin to a violation of the Commission's "host-selling" policy, rather than a program-length commercial.

not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.⁶ Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the GameBoy commercial and the “Pokemon” program regardless whether any “Pokemon” character is depicted given the image of a “Pokemon” game card contained in the commercial and the consequent likelihood that children may associate it with the program. Although the Licensee cited a case in support of assertion that this incident does not violate the children’s television commercial limits, that case is inapposite since it did not deal with the commingling of program content and commercial matter.

7. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs.⁷ Given this congressional concern, the Commission made it clear that program-length commercials, by their very nature, are extremely serious violations of the children’s television commercial limits, stating that the program-length commercial policy “directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter.”⁸

8. The number and magnitude of overages at issue here mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children’s Television Act of 1990.⁹ The reason the Licensee cited for the conventional overages, human error, does not mitigate or excuse them. The Commission has repeatedly rejected human error as a basis for excusing violations of the children’s television commercial limits.¹⁰ To the extent that the Licensee argues that the remaining violations were caused by errors which occurred in the programming supplied by the Station’s television network or were inserted into the program by the Station’s television network, this contention does not relieve it of responsibility for the violations. The Commission has consistently held that a licensee’s reliance on a program’s source or producer for compliance with our children’s television rules and policies will not excuse or mitigate violations which do occur.¹¹

9. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹² Section 312(f)(1) of the Act defines willful as “the conscious and

⁶ *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); *see also WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover of video aired during “Quack Pack” program); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

⁷ S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989).

⁸ *Children’s Television Programming*, 6 FCC Rcd at 2118.

⁹ *Id.* at 2117-18.

¹⁰ *See, e.g., LeSea Broadcasting Corp. (WHKE(TV))*, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp., supra*; *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994).

¹¹ *See, e.g., Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (MMB 1995); *Mt. Mansfield Television, Inc. (WCAX-TV)*, 10 FCC Rcd 8797 (MMB 1995); *Boston Celtics Broadcasting Limited Partnership (WFXT(TV))*, 10 FCC Rcd 6686 (MMB 1995).

¹² 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(1).

deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.¹³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁴ and the Commission has so interpreted the term in the Section 503(b) context.¹⁵ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”¹⁶

10. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for violation of Section 73.670.¹⁷ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”¹⁸

11. In this case, an upward adjustment is justified in light of the number and nature of the commercial overages. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$15,000 for its apparent willful and repeated violation of Section 73.670.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that WPIX, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of fifteen thousand dollars (\$15,000) for its apparent willful and repeated violation of Section 73.670 of the Commission’s Rules.

13. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, WPIX, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229.

15. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁵ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁶ 47 U.S.C. § 312(f)(2).

¹⁷ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

¹⁸ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁹

18. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WPIX, Inc., 220 East 42nd Street, New York, New York 10017, and to its counsel, R. Clark Wadlow, Esquire, Sidley Austin Brown & Wood LLP, 1501 K Street, N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁹ See 47 C.F.R. § 1.1914.